

Library



IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL DIVISION

INJURY CAUSE NO. 513 OF 2016

BETWEEN

MR ALLAN YOHANE..... CLAIMANT

-AND-

FR. DASIANO MUHIME.....1ST DEFENDANT

UNITED GENERAL INSURANCE COMPANY LIMITED2ND DEFENDANT

CORAM: THE HON. MR. JUSTICE D. MADISE

Mr. Nthembako Banda, Counsel for the Claimant

Mr. Mzembe Counsel for the Defendant

Mr. Michael Mike Mbekeani, Official Interpreter

Madise, J

JUDGMENT

1.0 Introduction

1.1 On 12th July, 2016 the Plaintiff in this matter took out a writ of summons against the defendants herein claiming damages for injuries sustained in a road accident which happened on 15th May, 2016 towards Nkonya Trading Center on the Mulanje/Chisitu Road. The defendants have disputed the claim and have called on the plaintiff to strict proof.

1.2 In his statement of claim the plaintiff has particularized his claim in the following terms.

1.3 Particulars of Negligence

- a) Driving too fast under the circumstances / over speeding.
- b) Failing to keep his nearside.
- c) Veering to the left side of the road.
- d) Failing to keep any or any proper lookout.
- e) Failing to stop, slow down or in any other way so as to manage or control the said motor vehicle.
- f) Failing to exercise or maintain proper effective control of the motor vehicle.
- g) Driving without due care and attention to other road users.
- h) Failing to see the plaintiff in sufficient time to avoid hitting him.
- i) Hitting the cyclist.
- j) Failing to keep any or any proper look out.

1.4 Particulars of injuries

- a) Fracture of the right tibia and fibula.
- b) Deep cut wound.

1.5 The Damages

- a) Pain, suffering and loss of amenities of life.
- b) Depriving and disfigurement.
- c) Special damages K3, 000 police report .K10, 346 Medical treatment and report.
- d) Costs of this action.

2.0 The facts

The Plaintiffs story is that on 15th May 2016 he was cycling on the left hand side of Mulanje/Chisitu road from the direction of Chisitu Trading center, towards Nkonya Trading center. At or near Providence Secondary School, he gave a hand signal that he was turning to the right. As he started turning the motor vehicle that was behind him collided with him. He was seriously injured and he was rushed to Mulanje District Hospital. He was admitted and was discharged on 23rd May 2016. His right leg was cast in plaster of Paris and the Plaintiff has exhibited the same in the medical report.

- 2.1 When the police investigated the accident, they came to the conclusion that the driver of the vehicle, the first defendant herein was negligent for overtaking improperly. That marked the end of the plaintiff's case. When the case was called for defence the defendants elected to call no witness and they proceed to close their case

3.0 The Issues

There are three main issues for determination before me.

- a) Whether the accident was caused due to the negligent acts of the 1st defendant.
- b) Whether the 2nd defendant is liable as an insurer

c) If the answers are in the affirmative, whether damages are payable.

4.0 The Law

4.1 The burden and standard of proof in civil matters is this. He/she who alleges must prove and the standard required by the civil law is on a balance/scales of probabilities. The principle is that he who invokes the aid of the law should be the first to prove his case as in the nature of things, a negative is more difficult to establish than an affirmative.

4.2 As Denning J, stated in Miler vs. Minister of Pensions [1947] 2 A II E.R. 372.

If the evidence is such that the tribunal can say 'we think it more probable than not' the burden is discharged, but if the probabilities are equal it is not

4.3 Similarly the degree of probabilities will depend upon the subject matter. When a civil court is deciding on a charge of fraud, it naturally follows that a higher degree of probability is required than when deciding an issue of negligence. However the standard does not reach as high as that required in a criminal court which is beyond a reasonable doubt. The general principle is that the court must require a degree of probability which suits the occasion and is commensurate with the law and facts

4.4 What is Negligence?

The law on negligence was well settled by Lord Alderson who gave perhaps the best description of the definition of negligence in the case of Blyth vs. Birmingham Water Works Company (1856) Ex. 781 at 784.

Negligence is the omission to do something which a reasonable man guided upon those considerations which ordinary regulate the conduct of human affairs would do or doing something which a prudent and reasonable man would not do.

4.5 Negligence as a tort has four requirements namely:

1. The existence in law of a duty of care which the law attaches liability to carelessness.
2. Breach of the duty of care by the defendant.
3. A casual connection between the defendant's careless conduct and the damage.
4. That the particular kind of damage to the particular claimant is not so unforeseeable as to be too remote.

4.6 Once this is established the next question is to consider whether the defendant is liable in damages and for how much.

4.7 Lord Atkins LJ when he decided Donoghue vs. Stevenson (1932) AL 562. Stated as follows

Who then in law is my neighbor? Neighbors are people who are so closely and directly affected by any act that I ought reasonably to have them in contemplation as being so affected when I'm directing my mind to the acts or omission which are called in question

4.8 Looking at the evidence before me, can it be said that the defendant was negligent and caused the plaintiff's injuries? Did the defendant owe the plaintiff a duty of care? Can it be said boldly and without hesitation that the defendant breached that duty of care which resulted in the

injuries the plaintiff sustained? Lastly can it be said that as a result of that breach the plaintiff suffered pain and damage to his leg and amenities of life? Lastly are damages payable in this matter?

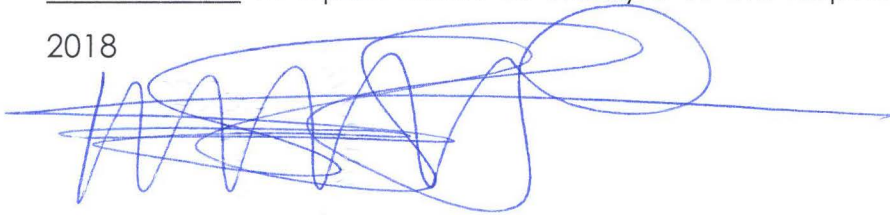
5.0 The Finding

- 5.1 There is no dispute that the Plaintiff was hit by a motor vehicle driven by the 1st defendant and insured by the 2nd defendant. There is no dispute that he sustained serious injuries. The plaintiff claimed that the accident was caused by the negligent driving of the 1st defendant. The police in their report have confirmed this. The defence have disputed the claim alleging that the accident was caused due to the contributory negligence of the plaintiff.
- 5.2 According to the facts it is my conclusion that If the plaintiff was cycling on the left and on the nearside of the road the ,the only way to turn right is to first move to the middle on the road on the white line and then indicate with a hand signal that he is turning right. You cannot turn right from the left near side without first going into the center of the road.
- 5.3 Anything to the contrary would distract the driver coming behind and cause an accident. The plaintiff saw that there was a vehicle coming behind. He could have first indicated, that he was moving to the center of the road before finally turning extreme right.
- 5.4 In this regard I agree with the defendants that the plaintiff had contributed to the accident. In these premises I find on a balance of probabilities that the 1st defendants was negligent up to 70% and the plaintiff contributed 30%. I therefore find in favor of the plaintiff in the ratio of 70-30%. I also award costs to the plaintiff in the same ratio. I further find the 2nd defendant liable as an insurer of the said vehicle in the same ratio but not exceeding the max value of the policy of insurance.

5.5 The plaintiff must take out summons for assessment of damages before the Registrar within 14 days.

I so order.

Pronounced in Open Court at Blantyre in the Republic on 27 November 2018

A handwritten signature in blue ink, consisting of a series of loops and a long horizontal stroke extending to the right.

Dingiswayo Madise
JUDGE